OUR POLITICAL DANGERS.

If a close observer had been asked at any time within the last fifteen years to name the greatest danger to which our national peace and good name were subject—the danger most like to come upon us with bewildering suddenness—he could hardly have failed to reply that it was that of a contested Presidential election. This danger did burst upon us three years ago. We then escaped, through a measure which might have failed had it not been forced upon our legislators by a pressure from the business community which it was difficult to resist. It needs little reading of public sentiment, especially among Democrats, to see that this plan is not likely to be tried again in our time. The experience is too full of suggestions for forming a judgment respecting the probable decision of any tribunal which might be proposed. The plan of 1877 was adopted by both parties because neither party could see clearly what the decision was likely to be. But for this, it is very doubtful whether an agreement could have been reached. If a similar contingency should meet us in the future, and the two parties be called upon, in the very heat of the contest, to agree upon a tribunal to whose decision both should submit, will it be possible to select a body of men whose opinion neither party shall believe that it can fairly divine? For we must remember that it is not necessary that the divination shall be correct; the plan is spoiled if the astute minds of leading politicians are led to any conclusion whatever, true or false.

One conclusion which both sides will draw from the experience of the past is, that those with whom the decision rests must have no political leanings, or if the leanings exist they must be absolutely undiscoverable. The possibility of finding a set of men to fulfill these conditions will hardly be maintained.

All this does not in any way militate against the Electoral Commission of 1877. Few acts of our political history are more honor-

able to our people than the fact that they were able to find a practical way out of a difficulty which, as human nature goes, might have been expected to culminate in anarchy or civil war.

Yet another warning of what may happen to us at any moment comes through the recent dispute in Maine. But for the firm and exceptional position taken by the Supreme Court of the State, a dual government would have continued to exist until the coming Presidential election, and the question would have been open whether the electors were certified by a legal State authority. It is vain to say that there can be no doubt judicially respecting the validity of the certificates, because the question will be raised not by a court, but by men feeling that their duty to their party and to their constituents requires them to do all in their power to secure the election of their candidate. Men's ideas of law differ when their interests lie in opposite directions. We need not expect them to agree when there is no judge to which the case can be submitted.

In times when one party or the other was almost sure to have an overwhelming majority, occasional disputed cases in individual States had little significance, and could be safely ignored. But one of the curious political phenomena of the present time is the tendency to a balance between the two parties—a tendency which seems to be rather on the increase. In several States the two parties are so nearly equal that a change of two or three per cent. of the voters from one party to the other will change the political complexion of the State, and every calculation seems to make it probable that the next Presidential election will turn upon the votes of one or two closely contested States, as it did in 1876. The genral subject of the law of elections, national as well as State, thus assumes a gravity never before known in our history.

Under such a state of things, the question how a dispute as to who is the rightful President of the United States shall be avoided or settled can not be considered apart from the general question of providing for cases of contested elections. Besides, it may be laid down as an axiom that no far-reaching question of public policy can be intelligibly considered apart from the national habits and characteristics with which it is associated. Such a question may be expected to assume a different bearing in every different community, and, as the modes of action and thought of the community change, these bearings change with it. We shall, therefore, ask the reader to take a somewhat wider survey of the situation than would be necessary for the mere discussion of a point of law.

The views which we wish to present will be reached in the most natural order if we begin with the consideration of a question respecting which the most conflicting opinions are entertained. Are our political practices pure or corrupt? Do our political parties represent the good faith of the honest community, or do they simply illustrate the depth of corruption and inefficiency to which honest men will allow their government to sink through their own neglect to take the control of public affairs? We may find this question answered in directly opposite ways, according to the special features of our political practices to which we turn our attention. The patriotic citizen, anxious to prove to suspicious foreigners that our system of political management is superior to that of any other nation, will be at no loss to find facts on which to base his thesis.

As an example of universal good faith he could take the votes of the electors of President and Vice-President during the half-century which has elapsed since the electors were first chosen especially to vote for designated candidates. Some three thousand men in all have been selected for this purpose. No oath, no pledge of any kind, verbal or written, is ever required of them. In law they are perfectly free to vote as they think best, and no legal disability would follow their action should they exercise this freedom in their own way. In order that no outside pressure may affect them, they vote by ballot. Yet not one of these thousands of men has ever failed to comply with the silent, unenforcible, and extra-legal understanding with which he was chosen. There are very strong reasons why no such understanding should exist, and the arguments for ignoring it may be made to look as strong as those for recognizing it. Yet the conscience of the individual has always placed the sacredness of good faith above every other consideration.

No matter how carefully we probe our politics to discover signs of corruption, we shall find the same rule to hold. There are unwritten laws of courtesy and good faith which, though they have sometimes been ignored by corrupt bodies in remote quarters, are never lost sight of in Washington. Where the distant spectator sees only a conflict in which each party is determined to get the better of the other, by fair means or foul, there is really a scrupulous regard by each party for the rights of the other, so far as these rights are mutually understood. When commissioners were chosen by each House of Congress to decide who was elected President, the Democratic House chose two Republicans, and the Republican Senate two Democrats, in accordance with a custom from which

not even the interests at stake and the deep feeling of wrong could make either party deviate. Such examples as these, which might be multiplied indefinitely, show beyond doubt that, beneath everything which has the appearance of dishonesty and corruption in our politics, there lies a substratum of good faith, amply secure for the support of the best attainable system.

But the cynic who thinks our public men and our political habits worse than those of any other enlightened nation can also find ample material on which to base an apparently conclusive argument. He can show that our political contests have ceased to turn upon questions of public policy, and are reduced to a scramble for power between two sets of men, each of whom expect to use their power for the benefit of themselves and their supporters. The next Presidential election bounds the horizon of all our active politicians; beyond that is the deluge—chaos—no one thinks what. The constant increase in the number of contested elections of all kinds, and in the readiness and even the avidity with which authorities are found ready to avail themselves of technical quibbles to set aside the votes of a whole community; the fact that four fifths of all contested elections to Congress are either decided in favor of the dominant party or annulled by an almost pure party vote; the failure of Congress for three years to make any serious attempt to guard against a contested election of President; the open distribution of offices as rewards for party services; in fine, the approach to universality with which we see every decently open question of political law decided according to the political sympathies of the judges—are specimens of the facts and opinions which can be adduced to show the absence of all principle from our politics, and the irresistible progress of a reign of corruption which shall involve our institutions in destruction.

How shall we reconcile these discordant conclusions, each seemingly based upon the strongest possible foundations of fact? Is there any middle ground between the two extremes? The person who tries to find any such ground will be hopelessly bewildered. Each of the opposing conclusions is true in its own way, and in showing how they are to be reconciled we shall find the key to the whole difficulty. The substratum of good faith indicated by one set of facts really exists in all its security, but we have no sufficient system of laws, written or unwritten, based upon it. The case may be stated in a nutshell in the form of two propositions:

Wherever there is any well-understood law or custom by which all parties are bound, we find obedience rendered with the most scru-

pulous fidelity, and at any expense of personal or political interest.

Where there is no such law or custom, all parties feel themselves at liberty to gain any advantage they can by any means, good or bad, which Providence may have placed within their reach.

The root of the whole matter is, that we have no juridical system governing cases of contested elections which expresses the moral sense of the community. This moral sense is all right and amply sufficient to secure an impartial decision of every case, and only needs the guiding hand of well-established and understood legal decisions. Good morals and integrity of purpose are not sufficient to secure a general agreement among men as to their mutual rights and privileges. Even an ethical system of the most abstract kind could not be evolved out of the intellect without reference to the experience of society. A system of law defining the mutual duties of man under every variety of circumstances is the growth of ages, and never reaches full maturity, no matter how good we may suppose man to be. Therefore it does not follow that, because men have no law to guide them, and habitually decide by force questions which ought to be decided by law, they must be morally degraded. What they want is a system of law, by which all shall be guided.

The reader may be expected to reply to this, that laws and customs form the best possible criterion of the moral state of the community, and that when the eulogist of our people admits that our laws and customs are insufficient to secure political justice he concedes away his whole case. We admit that there is a certain amount of soundness to this answer, but claim that it is only one of those rude approximations to truth upon which it is fallacious to base a conclusion. Before proceeding further, let us pause a moment to guard against a mistake respecting the objective point at which we aim in the discussion. Our object is not to discuss the moral condition of the nation, or to prove that we are a much better people than would be supposed from the state of our political law, but to show the imperfect state of that law and the causes to which the imperfections are due. If our corrupting practices afford a true index of our moral state, it is entirely useless to discuss their importance. We must, therefore, assume that there is a discordance between our morals and our conduct, or the whole discussion will be a mere piece of moralizing.

As already intimated, we admit a general tendency in the law of the country to reflect the moral state of its people, but we claim

that this tendency may be interfered with by many causes, natural or artificial. Prominent among these causes are changes in the constitution and habits of the people, and consequently in the subjects upon which their laws are required to operate. Without essaying a hasty generalization, we may venture the suggestion that, under great and rapid changes in the relations of men, and consequently in the questions which are to be decided in order that justice may be done, the law will always be found in a chaotic state, justice insecure, and practices corrupt. We have a well-known illustration in our recent history. The vast development of the railroad system in our country and the habit on the part of stockholders and managers of mortgaging their corporate rights to carry out their enterprises have given rise to a multitude of legal questions wholly unknown in former times. What is the result? Granger legislation, repudiated bonds, endless litigation respecting property in roads, an absence of continuous good faith between rival corporations which would be regarded as scandalous in public life, and a general uncertainty respecting the mutual rights of those concerned which would be wholly intolerable in any other class of affairs.

Our whole national history has been marked by changes in our political habits which would alone be sufficient to account for a great deal of uncertainty in our political jurisprudence, and of which we shall presently show the bearing. The trouble is intensified and the natural cure prevented, by the fact that the Constitution of the United States and of the separate States make no provision for any system of political jurisprudence, or for the growth of a system of law to govern cases of contested elections.

The contrast between the development of the law of private rights and that of elections will be made clear by a mere glance at the two systems of procedure to which they have respectively led. Disputants at law have to submit their cases to a court composed of men especially trained for the purpose, whose impartiality is secured by the very conditions of their action. In pronouncing a decision, the Court accompanies its judgment with an exposition of the principles on which the decision is based; and, in the case of the higher tribunals, this exposition is published for the information of the public, and the guidance of other judges. A basis is thus laid for better understanding between man and man, because other judges are bound either to follow the precedent or give their reasons for deviating from it, and the public, knowing this, can govern itself accordingly. The necessity of submitting to the decree pre-

cludes the possibility of rebellion on the part of the individual, and submission is easy, because the party feels that the decree is in accordance with an established principle, to be impartially applied in all cases of a like character. A law-abiding habit is thus formed which, in a progressive and healthy state of society, grows stronger with every generation until it becomes quite ineradicable; while the number of questions which might lead to litigation continually tends to diminish by being assimilated to cases already decided. Of course this tendency may be, and commonly is, more than counterbalanced by new complications in the relations of men to each other, but this is no fault of the system.

There is not, in the nature of the thing, any reason why there should not be a law of elections growing in this same way, and commanding the same respect from all interested parties. A system of such law would be far simpler than that of the common law, because of the less variety in the cases to be adjudicated. The methods of voting and making the returns, and indeed the whole process of determining the will of the people, are, in their essential features, the same over the greater part of the Union, and remain almost unchanged through long periods of time. The general character of the wrongs, whether these wrongs consist in fraudulent voting, fraudulent ballots, wrong spelling of names, mistakes in counting, failure on the part of officers to comply with the letter of the law in conducting the elections and formulating their reports, or neglect of duty on the part of those who should certify the results of elections, has remained unchanged within the memory of every reader, and is likely to remain so after our youngest grandchildren shall have passed away.

Yet we doubt the possibility of enunciating a single principle which the Executives and Legislatures of the States would feel bound to enforce against the interests of their party. Let us look, for instance, at the very first point which would be taken up by a lawyer or statesman empowered to draw up a code of election laws. The laws of the Union and of the several States prescribe certain forms of procedure to those officers who conduct elections and make the returns. As examples, the electors of President and Vice-President must give in their votes on the same day through the United States; in Massachusetts, and perhaps many other States, the selectmen are required to make public declaration of the votes in open town meeting; town clerks must, within ten days, transmit copies of the record to the Secretary of the Commonwealth. Now, suppose some of these

formalities are not complied with: the electors are prevented by a snow-storm from meeting on the prescribed day; the selectmen neglect to make the declaration required; the town clerks do not make their returns until the eleventh day. The very first question which would occur to the codifier is, Under what circumstances shall the votes thus discredited be counted, and under what circumstances rejected? It would hardly do to prescribe that the fact of the informality should be always ignored by the certifying authority, because not only would the law then become a dead letter, but the door might be opened to successful fraud. On the other hand, it would be contrary to sound policy to require that all such returns should be unconditionally rejected, because it would then be within the power of an officer to defeat the will of the people by mere neglect, and scarcely any regulation could be made as a safeguard which might not become a pitfall for catching the votes of the community. Some course between the two extremes would therefore have to be adopted. That a judicial tribunal would find any difficulty in formulating principles by which such cases should be decided we can hardly believe. Common sense teaches that the result of an election is really fixed when the polls are closed, and that the object of all subsequent proceedings is simply to ascertain that result. All regulations for the subsequent proceedings of officers are designed solely to make the process of ascertainment certain and easy. Hence only such errors on the part of returning officers as would defeat this object ought to lead to the rejection of their returns—such errors, for instance, as were purposely committed with fraudulent intent.

The general view which the public are apt to take of this class of questions is a very interesting subject of study in connection with the development of juridical ideas. Contrary to current ideas, the layman is more likely to exact a rigid literal interpretation of the law than the educated jurist. The views of the relative stages of the two systems of law which we wish to convey are well illustrated by a case said to have occurred in an Eastern court several years ago.

The defendant was the maker of a promissory note. The case against him was so clear that his counsel was embarrassed to find any plausible defense. Carefully scrutinizing the note, he at length noticed that it promised something entirely different from what the plaintiff claimed. He triumphantly informed the Court that his client stood ready to fulfill the terms of his contract, which only re-

quired him to pay the plaintiff three hundred *dolls.* We can readily imagine the embarrassment which this plea might have caused to a bench of Garcelons. "In this case," they would have reflected, "the defendant has made a promise in plain and unambiguous English. The plaintiff now appears and asks judgment on the assumption that the contract meant something radically different from its literal meaning. If we admit that a contract can say one thing and mean another, where shall we stop? What excuse can we find for supposing that the defendant meant anything but what he said?" But in the actual case the Court had none of those scruples. The only answer it deigned to make to the plausible attorney was, "Brother Smith, you are behind the age."

This answer was perhaps more philosophically true than the Court intended it to be. In a primitive state of jurisprudence the Judge would not have dared to decide that the written document meant one thing when it said another. It is only as intelligence and correct ideas of justice become more fully developed that men become ready to look at the substance rather than the form—the thing meant rather than the thing expressed. The unlearned public are inclined to take the older view, and to form an extraordinary idea both of the necessity and the sufficiency of the outward forms of expression and procedure. The common man's idea of a legal government is embodied in an apostolic succession of written certificates, each duly signed by the required officer and embellished with the proper seal. With the failure of any link of the chain the magic succession is broken, and all that follows is a reign of anarchy, and not of law. Of course this idea carries with it the converse one, that whatever bears the proper impress and is done in due form is for that very reason right. Any set of men who can get the proper certificates form a legal Legislature. As such they constitute the highest law-making power, and are subject to no law except the Constitution by authority of which they assemble. Men whom they exclude have no right to a seat, debts which they repudiate are no longer due, and the money which they declare legal is the only kind that any debtor is bound to pay.

We must not, however, denounce this slavish adherence to forms as unworthy of all sound jurisprudence. The system is necessary in a certain moral state of society. If it leads us to Scylla on one side there is a Charybdis in which we may be ingulfed on the other. If the Judge deviates from the letter, the danger to be guarded against is that of being governed only by his own interests or

prejudices, and of setting to society an example of laxity to be followed in cases where it will do more mischief than a rigorous adherence to the letter. When we deviate from the letter, it is absolutely necessary that we should be guided by a clear and well-defined appreciation of the substance. Now, this presupposes an advanced stage of juridical ideas, and the practicability of the change must depend on the state of society. It is a question which every one can consider for himself, whether we have reached this stage of progress.

An excellent illustration of the points we are seeking to elucidate is afforded by the recent dispute in Maine. It may be doubted whether the proceedings which finally resulted in giving the control of affairs to the Republicans fully satisfied the popular ideas of political law, and whether many excellent people, having no sympathy with the course of Governor Garcelon and his Council, have not felt that the Court was governed more by the political exigency of the case than by sound law, in deciding that men who held no certificate from the Governor could legally take seats in the Legislature before the fact of their election had been formally inquired into by that body. That the exigency was an imperative one must have been plain to any one able to devote a little calm and impartial reflection to the case. The theory on which the Governor proceeded was that, in counting and examining the votes, he was bound to reject any and all returns which he might be pleased to consider informal. We have his word that he applied this theory with such impartiality that he rejected more Democratic than Republican returns. But so great was the proportion of rejected returns that the small surplus of Republican majorities thrown out was sufficient to deprive some fifteen or twenty per cent. of the elected members of their seats, and to change the political complexion of the Legislature. Now, it is plain to any one who will look into the subject that, if this system should become universal, the continuance of a republican form of government would be no longer possible. The people of Maine are among the best educated of the Union, and, if their town officers can not prepare returns which will stand the scrutiny of examination, it is certain that those of no other State can. If the question whether a return is formal is to be considered and decided by every Governor in his own way, and according to his own notions of formality, people would soon conclude that it was useless to go to the trouble of voting. The advice of a council of lawyers at the table of every

returning board would not suffice unless the lawyers knew exactly what the Governor's ideas of form were. Under any plan which could be put into operation, the Executive could find excuses for rejecting returns enough to elect a majority of his own choice, unless the majority against him was so great as to render such a course suicidal.

The Supreme Court might therefore have decided as it did, on the ground that self-preservation is the highest law. But, if we look at the matter closely, we shall see that the Court did nothing more than apply to a political case the very same kind of law which is every day applied to transactions between individuals. The reader may derive instruction as well as amusement from the parallel between the view of one of the returns taken by Governor Garcelon and the legal plea of the ingenious Smith already referred to. It will be remembered that in one or more of the returns the number of votes cast for some of the candidates was indicated by writing the word "ditto" in the column devoted to the numbers. These returns were all rejected, on the ground that the number of votes was not stated. The Governor made no serious pretense of not knowing what the returns meant, for every child of ten years old and upward is well acquainted with the form of expression used. The meaning was clear and decisive, the only fault being that the statement was not made in such a form as to secure the approval of the Executive. So, in the Boston case, Brother Smith made no pretense of believing that his client meant anything but dollars when he drew his note for dolls, only he did not express himself in the right way. It is perhaps hardly fair to the zealous lawyer to claim a parallel, for his case was certainly incomparably stronger than that of the fastidious Governor, insomuch as *doll* is a well-known English word, and he only asked the Court that the note should be adjudged to mean what it said, while the Governor asked that plain English, or at least commercial English, should be ruled out on the ground (we suppose) of not expressing anything.

Far from being an opinion to suit an exigency, no more wholesome and timely lesson in political morals and jurisprudence was ever given to the American people than that contained in the answers of the Supreme Court of Maine to the questions submitted. The men who had the courage and penetration to frame these answers deserve the gratitude of all men without regard to party, and the principles on which the decision was based should be taught in our public schools throughout the land. The substance of the prin-

ciples is that the highest authority in the State, in issuing certificates of election, is bound by the same kind of law that rules between man and man ; that a fraudulent or incorrect paper is of no value ; that a political party has no more right to take advantage of technical defects, or of certificates wrongly issued, than an individual has ; and that the men who, on the face of the honest returns, appear to be elected to the Legislature, have a right to meet and organize, even if they do not have the official certificates. Democrats who now denounce this law seem to forget that it is the very law under which their party took possession of the State governments of Louisiana and South Carolina in 1877, after their certificates of election had been refused by proceedings quite analogous to those of Governor Garcelon in Maine. The close parallel between the two cases shows how little room there is for bringing partisan considerations into the matter.

Why is it that our political law is so far behind our private law? To state the question more exactly, why do we find in our political management a total absence of those well-established habits of regulating disputes which naturally grow up in every civilized community? The answer is, that we have excluded from our politics that plan of deciding questions which the experience of ages shows to be the only one under which a system of jurisprudence can be developed, namely, the plan of submitting all disputes to independent and impartial tribunals, bound to do justice, and to assign the reasons for their decisions. The growth of political law was made impossible when we introduced from the mother-country the constitutional provision that Legislatures should be the sole judges of the elections of their members. However sound may have been the reasons for this provision in England, or in times past, in our own land they have all passed away with the changes in our political feelings, and the practice is now only a source of mischief. That the qualities we have described as attaching to judicial decisions can never attach to the decisions of a large deliberative body, hardly needs argument. In the first place, unless the case is a very simple one, only an insignificant number of the members can acquaint themselves with its merits. They are neither sworn to do justice, bound to give reasons for their action, nor expected to follow any precedent. They may vote one way to-day and directly the opposite to-morrow, without being called to account. Their decisions form no precedent for themselves or any one else. As party contests increase in virulence, we see a constant tendency to divide

on party lines in all cases of contested elections, and to make it a matter of party fealty always to vote for the party contestant. Unless some moral revolution occurs, the practice will continue growing worse, and we may, in time, expect to see all cases of the kind, in which there is the smallest room for a difference of opinion, decided by a party vote.

The only cure for this state of things is to introduce the system of submitting all cases of contested elections, and all cases involving the duties of the various officers engaged in conducting and declaring them, to regularly constituted courts. The habit of submission to law, which is so deeply rooted in our national character, would then insure a peaceable and satisfactory determination of every case, and the growth of a system of political law as permanent and well-defined as the law regulating the relations of individuals. The only strong objection which is likely to be made to such a course is, that the questions to be submitted are political, and therefore ought not to be decided by a court of law. One of the strongest objections to the Electoral Commission was, that it brought the Supreme Court into politics. The fact that a question was a political one has been adduced as a reason why the courts should refuse to decide it. At the bottom of these objections is, no doubt, the fear that the Court might pronounce a decision contrary to the popular will, and that the latter would, in the long run, be sure to be executed in defiance of the Court, which would thus fall into contempt.

We may begin with the consideration of this last objection. Under the proposed plan a court could not possibly decide against the popular will for the reason that its office would be to determine what that will was, and to pronounce such judgments that it should be certainly executed. To claim that political questions ought not to be the subjects of judicial decision is either to mistake what political questions are or to claim that our political practices should not be amenable to law. Such questions as whether A or B is elected to Congress; whether an officer could be considered as *prima facie* entitled to a seat without a certificate from the Executive of his State; whether a disputed return should or should not be considered valid; whether this person or that had a right to vote, are not properly political, but so vitally affect the rights of individuals that they are proper to be decided by a court of law. The purification of our political practices, in this one way in which it can be effected, must continue to become a matter of more imperative necessity. The further society advances in wealth and civili-

zation, and the more complex the relation between different men and different classes, the more complex and the more exact must be the legal system by which those relations are regulated. Rules of right and wrong, which would entirely suffice in a new mining town, would be wholly insufficient in a great city. The simple laws under which our ancestors lived a couple of centuries ago would be wholly insufficient at the present time. What would be our social state, if during our whole history we had adopted a plan of settling private disputes under which no permanent development of law was possible? What would have been tolerable a century ago would now be destructive of all progress. Yet this is exactly what we have done in our plan of settling contested elections. There are strong reasons for an improvement, which do not exist in any other country, and which have not before existed in our own, but which we are very apt to overlook. We can look to no other country for our precedents, because in no other enlightened country are elections so frequent, the officers to be elected so numerous, and the legal questions connected with them so complex. The fact that a given system has sufficed for England affords no reason why it should suffice for ourselves.

Another thing having an important bearing on the case is the consolidation of certain political habits within the present generation which necessitate our taking new views of many public questions. It is difficult to give any general and exact definition of what these changes consist in: they are rather to be inferred from the several features exhibited by a survey of our political feelings and habits.

One of these features to be noted is the great development of the art of political management, of which we are all witnesses, but of which no one can see the ultimate result. Our political contests now bear the same relation to those of half a century ago that a battle between two turreted ironclads does to the battles of Drake or Nelson. The people are still the source of power, but much in the same way that the sailors who work the guns of an ironclad are the arms of victory. The primitive idea of a republic, as a government under which all questions are decided by an independent opinion of each individual citizen, has almost vanished. Nine tenths of the voting population are organized in the similitude of two opposing armies, and go to the polls under a moral influence which seems to be as effective as if they were actually members of regiments and battalions, and were compelled to vote as their offi-

cers directed. We have a something which every one feels, though it is difficult to describe it exactly—a thing which its friends call "organization" and its enemies "the machine." Notwithstanding all that has been written and said against this something, it is constantly increasing in power and efficiency. It distributes offices, decides who shall be candidates, brings a half million voters to the polls who otherwise might have remained home through indifference, raises money for election expenses, plans political campaigns, and is what every one has in mind when he thinks how an election is to be carried. How far the "machine" is inimical to our political welfare; in what measure it tends to dishonesty; to what extent its sole work may be to give effect to the popular will, with a speed and certainty before unknown—are questions respecting which the most divergent opinions may be honestly entertained. But there is one thing connected with it which we think can not be disputed, namely, that the opposing machines of the two political parties are dangerous fighting engines which, as they become more and more powerful, are required by the best interests of society to be brought into greater subjection to law.

Closely connected with this feature is another, of yet greater interest to the political philosopher, namely, the purely factitious lines by which parties are now separated. All our traditional notions of political parties, their purposes, their objects, and the nature of their contests, are in a fair way to be completely reversed. The original conception of such a party, and the conception which has found expression in our Constitutions, is that of a body of men drawn into sympathy with each other by common ideas of public policy, and organized for the sole purpose of carrying out definite views, shared by all in opposition to the members of opposing parties. It was supposed that the strongest political antagonisms would be those between different interests, different sections, different views of governmental policy and different branches of the government. The representatives from one State would, by virtue of their peculiar situation, and the habits of their people, have one political interest, and those from other States others; the courts would represent one set of views and the Legislatures another. In such a state of things there would be more or less reason for attempting, so far as practicable, to preserve the complete autonomy of each interest, each section, and each branch of the Government.

The curious feature which we commend to the attention of thinking men is, that antagonisms of this character have almost

ceased to figure among those which divide political parties and on which courts would have to pass judgment in cases of contested elections. At the present time neither of the parties which would appear before the Court in such cases could be said to represent any well-defined policy which it was seeking to maintain in opposition to the other party. The dead level was reached at the last Presidential election, when, leaving out the *brutum fulmen* which each party discharged at the other, the two might have exchanged platforms without taking any embarrassing pledges, renouncing any favorite policy, or alienating their respective adherents, and when it was hardly possible to name a debatable measure which one would distinctly oppose and the other favor. If any original party, say the Federalists of our early history, or the Republicans of twenty-five years ago, had been offered power on condition of reversing their policy, they would have inquired with wonder what use power could be to them if, in order to attain it, they had to surrender the sole purpose of desiring it, namely, the execution of the policy they were organized to carry out. But, at the present time, either party is ready, within such limits as it may consider reasonable, to take either side of any disputed question, if it can thus be certain of carrying the next election. Questions which before were fought out between two opposing parties are now fought out within the ranks of each, without any serious and permanent break in the front which it presents to its opponents. Of all political questions since the close of the war, that in which the greatest interests are involved is the question of the currency. It is hardly to be expected that another question which will come home to every family in the land is likely to arise in our day. Yet, so far as fundamental principles are concerned, each party has divided upon it, without any breach sufficient to weaken it in the coming contest.

It may be maintained that this is only an abnormal and temporary state of things, which will cease as soon as an exciting question is presented to the people. Ever since the war, good men have been expecting to see the present parties disintegrate and new ones formed to meet each other on the new issues of the day. Especially has the moribund condition of the Democracy been the subject of moralizing on the part of Republicans, who seemed about ready to put on mourning for their old antagonist; and yet both organizations are to-day more compact than ever, and, could the Democratic party only keep its wayward and unruly members in subjection, it could hardly fail to elect the next President. We see no

reason why the present state of things should not be permanent, and all questions of policy be fought out within each party after the example of the currency question. When a new question arises, instead of joining issue upon it, each party takes the side which it thinks will secure the most support. Neither has any plan which it wishes to carry out in opposition to the popular will. When, in 1875, the Democracy laid aside its time-honored principles, stepped upon a soft-money platform, and adopted the wildest vagaries of its old enemy Wendell Phillips, it was because the will of the people was supposed to favor this course. When this proved to be an error, party organs were quite ready to apologize for the mistake, and to advocate a reversal of the policy. Party organization, notwithstanding the factitious character of its antagonisms, having proved stronger than every other interest, it may be fairly assumed that it will continue to prove so. We can hardly expect within our time to see a national party contest on well-defined political lines. With this state of things, the last remaining reason for continuing the old system of deciding elections is annulled, and the necessity of a better one made imperative.

What has already been said of our present and future political exigencies will now enable us to judge of the conditions which should be fulfilled by any practical plan designed to settle contested Presidential elections. A number of measures intended to effect this object have been introduced into the present Congress, although none have been finally acted upon. It is discouraging to see how feeble the public demand for action is, in view of the great danger we are running for want of it. We shall, however, throw out some hints upon the most pressing requirements of the case, hoping that they will prove not wholly unworthy of the consideration of thinking men.

The first point which we make, and the one which overshadows all others in importance, is that the decision must be a judicial one. All that we have said of the advantages of judicial decisions by permanent courts over the resolutions of deliberative assemblies applies to the case in hand. From this point of view a fatal objection will be seen in one feature which enters into a number of the proposed measures, namely, that a certificate of the electoral or other vote of a State may be rejected by a concurrent vote of the two Houses of Congress. Others go yet further, and propose that a controverted certificate shall not be received unless both Houses concur in doing so. Should a controversy of any sort arise, can

any one for a moment suppose that it would become anything but a party question, should there be the smallest possible ground for a difference of opinion? We must not judge the case by what might happen in the first instance, because it is one which constantly tends to grow worse. As we have already shown, the system is one under which precedent is the only recognized law; and, when one party begins by deciding in its own favor, the other will follow whenever it gets a chance, in order to secure equity. We can hardly doubt that the nature of the vote by which the last election was determined operated as a strong incentive on the Democrats of the Forty-fifth Congress to avoid taking any action which might tie their hands at the next election. But why reason about the matter? The manner in which contested elections to Congress are habitually decided shows us exactly how it would be in a similar contest over the Presidency, where the motive for the decision in favor of the party would be incomparably stronger.

In judging the case we must remember that the proposed laws lay down no principles by which Congress is to be governed in reaching a decision, and require from no member a submission of the reasons for his vote. The whole question is one of individual conscience under circumstances in which conscience has no rule to guide it. We must not be understood as founding our objections on the weakness or wickedness of human nature. Men would vote for their party, not because they were bad or unprincipled, but for the simple reason that no law or principle regulating their vote is laid down for their guidance, and it would be a work of supererogation for any one to be better than his neighbors.

Among the bills now under consideration, that of Mr. Bicknell provides that, in the event of a controversy in any State as to the appointment or eligibility of electors, the same may be passed upon by its highest judicial tribunal in accordance with its laws. This proceeding is in perfect agreement with the principles we have laid down, but unfortunately it gives the two Houses of Congress the power to reverse the State decision, and indeed to reject any of the electoral votes it may choose.

Another measure, which fully complies with the required conditions, is that of Mr. Thomas Updegraff. It provides for carrying a case of contested elections into the United States courts. A person claiming the office of President, in opposition to the count declared by Congress, may bring action in the Circuit Court of the United States, and the case may be carried by appeal to the Supreme Court.

It seems completely adapted to carry out the required object, excepting on a single point. As a condition precedent to any such action, one House of Congress must, by resolution, express dissatisfaction with the result of the count. Now, it is not to be expected that, in case both Houses are of the same political complexion, either House will be dissatisfied with the choice of its own candidate. Nor under such circumstances is it likely that the candidate of the other party would be declared elected, unless the case in his favor was so clear as to preclude all doubt. The condition in question, therefore, renders the plan entirely inoperative unless the two Houses are of opposite politics, which is not likely to be the case half the time. We fail to see any sound reason why any candidate, who has received electoral votes and considers himself unlawfully deprived of the office, should not be allowed to sue in the United States courts.

It must always be borne in mind that what is wanted is not simply a legal and political but a moral effect. When a case is decided against one party, we want that party to feel that the decision is based on law, and not on mere force of numbers, because, without this feeling, the proper effect will not be produced. The party thus wronged in his own estimation may submit, but a sore will be left which can not be readily healed. The reason why the decision of the Electoral Commission of 1877 has been demoralizing rather than otherwise is not because it decided in favor of the Louisiana Returning Board, nor because the vote was eight to seven, but it was because the Commission divided on supposed party lines. If two or three Democrats had voted with the Republicans, and *vice versa*, it would now be very much easier to adopt some plan for the future, even though, at the time, the result had been the same. Under the actual circumstances it is not possible for the Democrats to feel otherwise than that they lost, not because they had the weaker cause, but because they had not the good fortune to get the fifteenth member of the Commission. On the whole, we see no way in which a permanently satisfactory system can be inaugurated except by making every decision of a disputed case a judicial one, to be pronounced by some permanent Court.

SIMON NEWCOMB.